

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DARDEN RESTAURANTS, INC.; GMRI,
INC.; YARDHOUSE USA, INC.; and
YARDHOUSE NORTHRIDGE, INC.,

Case: 31-CA-158487

and

FILBERTO MARTINEZ, An Individual,

**RESPONDENTS' EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE JOEL P. BIBLOWITZ'S DECISION
AND REQUEST FOR ORAL ARGUMENT**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondents respectfully file the following exceptions to the August 18, 2016 Decision of Administrative Law Judge ("ALJ") Joel P. Biblowitz.¹

1. To the failure to consider or address the seventh issue identified by the ALJ as relevant to this matter "[w]hether the Board and/or Martinez are estopped from pursuing this particular matter," (D. 5:6), as this is contrary to the law and the record.
2. To the failure to consider or address Respondents' argument that this matter must be dismissed due to the lack of a viable charging party, (D. 1-9), as this is contrary to the law and the record.
3. To the failure to consider or address Respondents' argument that the initiation and continuing pursuit of this matter and the remedies sought violate Respondents'

¹ References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ____:____." References to the parties' Stipulation of Facts are by the letters "Stip." followed by paragraph number, e.g., "Stip. ____." Finally, references to the parties' exhibits submitted with their Stipulation of Facts are by the letters "Ex." followed by exhibit number, e.g., "Ex. ____."

constitutional right to petition, (D. 1-9), as this is contrary to the law and the record.

4. To the failure to consider or address Respondents' argument that the General Counsel did not and could not establish that the charging party was engaged in protected concerted activity, (D. 1-9), as this is contrary to the law and the record.
5. To the conclusion that the Dispute Resolution Process (the "DRP") violates Section 8(a)(1) of the National Labor Relations Act (the "Act"). (D. 7:39-41), as this is contrary to the facts and the law.
6. To the implicit conclusion that the ALJ was bound to follow *D.R. Horton*, 357 NLRB 2277 (2012), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2104), and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015), (D. 8:743-8:6), as this is contrary to the law.
7. To the reliance on the decision by the United States Court of Appeals for the Seventh Circuit in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 2016 (7th Cir. 2016), and implicit rejection of the decisions by the United States Court of Appeals for the Second, Fifth, and Eighth Circuits, *D.R. Horton v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Murphy Oil II*, 808 F.3d 1013, 1016 (5th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2nd Cir. 2013), (D. 8:8-25), as this is contrary to the law.
8. To the conclusion that the DRP is a contract that limits Section 7 rights and is in violation of Section 8(a)(1) of the Act, (D. 8:29), as this is contrary to the law and the record.

9. To the conclusion that Respondent GMRI violated Section 8(a)(1) of the Act by requiring its employees to agree to the DRP as a condition of employment, (D. 8:43-45), as this is contrary to the law and the record.
10. To the conclusion that “[t]he law is clear that lawsuits which attempt to enforce contract provisions which violate the Act, [sic] constitute independent violations,” citing *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 747 (1983), (D. 8:53-9:2), as this is contrary to the law and a misapplication of the *Bill’s Johnson’s* decision.
11. To the conclusion that by filing court actions on May 7 and May 8 to dismiss Martinez’s court action and requiring him to arbitrate his dispute under the terms of the DRP, “the Respondents further sought to restrict his right to engage in protected concerted activity, in violation of Section 8(a)(1),” (D. 9:3-7), as this is contrary to the law and the record.
12. To the conclusion that the continued maintenance of the DRP “constitutes a continuing violation that is not time barred by Section 10(b),” (D. 9:10-12), as this is contrary to the law and the record.
13. To the conclusion that each Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act, (D. 9:16), as this is unsupported by the record.
14. To the conclusion that “[b]y requiring employees, and prospective employees, to sign the DRP, whereby they agree to individual arbitrations to resolve any labor dispute that they had with their employer, thereby waiving the right to maintain

class or collective actions in all forums, respondent GMRI violated Section 8(a)(1) of the Act,” (D. 9:18-21), as this is contrary to the law.

15. To the conclusion that “[b]y bringing Court actions on May 7 and May 8 the Respondents Darden, GMRI, Yard House USA and Yard House Northridge violated Section 8(a)(1) of the Act,” (D. 9:23-24), as this is contrary to the law.
16. To the remedies set forth in the ALJ Decision, (D. 9:29-41), as the law does not support such remedies.
17. To the order of reimbursement of expenses and legal fees to the charging party, (D. 9:34-38), as such remedies are contrary to public policy.
18. To the ALJ’s failure to rule on all material issues of fact, law, or discretion presented on the record as required by Rule 102.45 of the National Labor Relations Board’s Rules and Regulations.

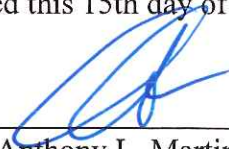
Request for Oral Argument

As discussed more fully in Respondents’ Brief in Support of Exceptions to ALJ’s Decision, oral argument will aid the Board’s understanding of the record and legal issues presented, the broader context in which the issues should be viewed, and the unique considerations of public interest presented in this case.

Conclusion

For these reasons, Respondents respectfully ask that the Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety; that the exceptions of Respondents be granted; and that the Decision of the ALJ be reversed.

Respectfully submitted this 15th day of September, 2016.



Anthony L. Martin, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
3800 Howard Hughes Parkway, Suite 1500
Las Vegas, NV 89169

Brian E. Hayes, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K. Street, N.W., Suite 1000
Washington, DC 20006

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2016, the foregoing **RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JOEL P. BIBLOWITZ'S DECISION AND REQUEST FOR ORAL ARGUMENT** was filed electronically and that true and correct copies of the same were sent via facsimile and email to the following:

For the NLRB:

Eric H. Brooks, Esq.,

Email: eric.brooks@nrlb.gov

Fax: (212) 264-2450 (R-2), Fax: (310) 235-7420 (R-31)

Vanise J. Lee

Email: vanise.lee@nrlb.gov

Fax: (415) 356-5254

For the Charging Party:

Matthew J. Matern, Esq.

Email: mmatern@maternlawgroup.com

Fax: (310) 531-1901

Respectfully submitted, this 15th day of September, 2016.



Anthony L. Martin, Esq.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

3800 Howard Hughes Parkway, Suite 1500

Las Vegas, NV 89169

Brian E. Hayes, Esq.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

1909 K. Street, N.W., Suite 1000

Washington, DC 20006

Attorneys for Respondents

26020639.1